Supreme Court, U.S.
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No. 00-706

In The

Supreme Court of the United States

HOGAN MANAGEMENT SERVICES, P.C.,

Petitioner,

v.

JOSEPH A. MARTINO d/b/a
NORTH GEORGIA ORTHOPAEDICS, P.C.,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY 1

I. Respondent Joseph A. Martino d/b/a North Georgia Orthopaedics, P.C. [hereinafter "Martino"] Has Misstated Rule of Law Used as Basis for Contending that This Court Lacks Jurisdiction Over Cross-Appeal 1

II. This Court Has Jurisdiction of the Appeal Because Finding of Mootness By Court of Appeals Was In Absence of Fair or Substantial Support 1

A. Assertion By Martino 1

B. "Without Any Fair or Substantial Support" Standard 2

C. Ruling By Court of Appeals Lacked Fair and Substantial Support 2

1. Statutory Duty of Court of Appeals.. 2

2. Points of Law Raised By Hogan in Regard to Mootness And Treatment of Those Points of Law By Court of Appeals 3

3. Conclusion 4

III. Unequal Bargaining Power Alone Is Not Basis For Classification 4

IV. Indefinite Provisions Do Not Render Restrictive Covenants Unenforceable 7

V. No Dispute Regarding Negotiation of Restrictive Covenants 8

TABLE OF CONTENTS – Continued

Page

VI. Liberty to Contract Grounded in Constitution .. 8

VII. Martino's Presentation of Argument as "Facts" 9

VIII. Partial Severance Not Prohibited By Georgia Constitution..... 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES:

Felix v. The State, 271 Ga. 534, 523 S.E.2d 1 (1999) 3

Henry v. Mississippi, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965) 1

Miller v. Wilson, 236 U.S. 373, 35 S. Ct. 342, 59 L. Ed. 628 (1915) 8

Pepsi Cola Bottling Co. v. First Natl. Bank of Columbus, 248 Ga. 114, 281 S.E.2d 579 (1981) 7

Pharr v. Woodall, 226 Ga. 1, 172 S.E.2d 404 (1970) 3

Richard P. Rita Personnel Services International, Inc. v. Kot, 229 Ga. 314, 191 S.E.2d 79 (1972) 5

Staub v. City of Baxley, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958) 2

Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981) 6

Ward v. Board of Com'rs of Love County, 253 U.S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920) 2

Watson v. Waffle House, Inc., 253 Ga. 671, 324 S.E.2d 175 (1985) 6

White v. Fletcher/Mayo/Associates, Inc., 251 Ga. 203, 303 S.E.2d 746 (1983) 5

STATUTES

O.C.G.A. § 5-6-30 (1965) 2, 3, 4, 6, 8

O.C.G.A. § 5-6-48(b)(3) (1965) 3

O.C.G.A. § 9-11-65(c) (1966) 1

O.C.G.A. § 13-3-44(a) (1981) 3, 4, 7, 8, 10

TABLE OF AUTHORITIES – Continued

Page(s)

CONSTITUTIONAL AUTHORITY

Fourteenth Amendment, United States Constitution 8

Ga. Const. Preamble (1983) 9, 10

MISCELLANEOUS

3 Corbin on Contracts § 8.11 (rev. ed. 1996 Holmes) 7

6A Corbin on Contracts § 1390 (1962) 9

Restatement (2d) Contracts § 90 (1981) 10

Restatement (2d) Contracts § 184(2) (1981) 5, 10

REPLY

I. Respondent Joseph A. Martino d/b/a North Georgia Orthopaedics, P.C. [hereinafter "Martino"] Has Misstated Rule of Law Used as Basis for Contending that This Court Lacks Jurisdiction Over Cross-Appeal.

On page 7 of his Brief in Opposition, Martino contends that the Court of Appeals' holding that the restrictive covenants were unenforceable constituted an "adequate" basis for a finding that the trial court's initial restraint had been "wrongful" under O.C.G.A. § 9-11-65(c). Martino then concludes that this Court lacks jurisdiction over the cross-appeal.

Martino's contention rests entirely on a misstated legal standard. The actual principle set forth in his cited cases is that this Court " . . . will decline to review state court judgments which rest on *independent and* adequate state grounds . . . " [emphasis added]. *Henry v. Mississippi*, 379 U.S. 443, 446, 85 S. Ct. 564, 567, 13 L. Ed. 2d 408 (1965). A finding of "wrongful" restraint resulting from partial severance of a restrictive covenant is wholly dependent upon a prior determination that Georgia law prohibits partial severance in that particular fact situation, which centers around the rule of law that Hogan contends is unconstitutional. Consequently, application of the true "independent and adequate" legal standard to the cross-appeal reveals that Martino's contention is meritless and should be summarily ignored.

II. This Court Has Jurisdiction of the Appeal Because Finding of Mootness By Court of Appeals Was In Absence of Fair or Substantial Support.

A. Assertion by Martino.

On page 8 of his Brief in Opposition, Martino asserts as follows:

> . . . the Georgia courts in this case did not engage in "classification" in ruling that [Petitioner Hogan Management Services, P.C. [hereinafter

"Hogan"]]'s appeal is moot. Thus, there are adequate non-federal grounds supporting the Georgia courts' ruling, and this Court lacks jurisdiction to review it.

B. "Without Any Fair or Substantial Support" Standard.

Adequate grounds did not exist for the Court of Appeals' finding of mootness. In reviewing another decision of the Court of Appeals of Georgia, this court found as follows:

> . . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. 'Whether the constitutional rights asserted by the appellant were . . . given due recognition, by the (Court of Appeals) is a question to which the (appellant is) entitled to invoke our judgment, and this (she has) done in the appropriate substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' *Ward v. Board of Com'rs of Love County*, 253 U. S. 17, 22, 40 S. Ct. 419, 421, 64 L. Ed. 751 and cases cited.

Staub v. City of Baxley, 355 U.S. 313, 319, 78 S. Ct. 277, 280, 2 L. Ed. 2d 302 (1958).

C. Ruling By Court of Appeals Lacked Fair and Substantial Support.

1. Statutory Duty of Court of Appeals.

O.C.G.A. § 5-6-30 provides in pertinent point as follows:

> It is the intention of this article to provide a procedure for taking cases to the Supreme Court

> and the Court of Appeals . . . to that end, this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case *or refusal to consider any points raised therein*, except as may be specifically referred to in this article.

[emphasis added]. In *Felix v. The State*, 271 Ga. 534, 538, 523 S.E.2d 1, 5 (1999), the Georgia Supreme Court interpreted O.C.G.A. § 5-6-30 in clear and certain terms, "The General Assembly has made it clear that all points raised in an appeal are to be considered by the appellate court."

Felix mandates that the Court of Appeals was statutorily required to address every point of law relating to the issue of whether Hogan's appeal is moot. A thorough, studied conclusion that Hogan's appeal is moot is a necessary precedent to the application of O.C.G.A. § 5-6-48(b)(3). The O.C.G.A. § 5-6-48(b)(3) exception to O.C.G.A. § 5-6-30 does not become effective until a court has reviewed all points of law relating to the issue of mootness, and then has concluded that the issue is moot.

2. Points of Law Raised By Hogan in Regard to Mootness And Treatment of Those Points of Law By Court of Appeals.

Hogan asked the Court of Appeals to address three points of law which lead to the conclusion that the appeal is not moot: (1) the cross-appeal maintains the justiciability of the merits of the appeal, (2) a liquidation damages clause in Martino's employment contract provides an O.C.G.A. § 13-3-44(a) (1981)[1] definite and substantial

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[1] "Where a decision of this court overlooks and fails to give effect to a statute, the statute, and not the decision wherein such statute was overlooked, is controlling." *Pharr v. Woodall*, 226 Ga. 1, 2, 172 S.E.2d 404, 405 (1970). Thus, since the Supreme Court overlooked O.C.G.A. § 13-3-44 (1981) in the cases cited by Martino, the Court of Appeals was duty-bound to not consider

equitable remedy maintaining the appeal as a justiciable issue, and (3) O.C.G.A. § 13-3-44(a) (1981) allows the trial court to craft an equitable remedy for an expired covenant. The Court of Appeals declined to perform its statutory duty and did not address any of these three points of law in its decision.

3. Conclusion

It was not "fair" for the Court of Appeals to rule that Hogan's appeal was moot because the Court of Appeals neglected to perform its O.C.G.A. § 5-6-30 statutory duty to address Hogan's points of law regarding mootness. Further, the Court's finding lacked "substantial" support because the case law relied upon by the Court of Appeals is directly contrary to the statutory provisions of O.C.G.A. § 13-3-44(a) (1981), and, therefore, is not controlling authority on the question of mootness. Since the decision of the Court of Appeals lacks fair and substantial support, the Court of Appeals' finding of mootness is not an adequate non-federal ground to preclude this Court's jurisdiction on the constitutionality issues raised in the appeal.

In addition, the question of mootness itself is still a live controversy because the distinct possibility exists that, upon remand, the Supreme Court of Georgia would be statutorily bound to apply O.C.G.A. § 13-3-44(a) (1981) to this fact situation, which would eventually allow a trial court to craft an equitable remedy flowing from Martino's breach of the reasonable portion of the expired covenants.

III. Unequal Bargaining Power Alone Is Not Basis For Classification.

On page 10 of his Brief in Opposition, Martino asserts that unequal bargaining power alone accounts for the

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the cases as binding precedent and to look to O.C.G.A. § 13-3-44 (1981) as controlling authority, or, at the very least, to address this point of law in its decision.

classification of employers and purchasers of businesses. This contention misconstrues the relationship between *Richard P. Rita Personnel Services International, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79 (1972) and the classification at issue.

In *White v. Fletcher/ Mayo/ Associates, Inc.*, 251 Ga. 203, 208, 303 S.E.2d 746, 750 (1983), the Supreme Court of Georgia explained how the *Rita Personnel Services* doctrine was served by the classification:

> . . . we find that redrafting the covenants would create a serious danger of sapping the vitality of the Rita Personnel Services doctrine. Such redrafting it [sic] would encourage a purchaser of an existing business to genteelly *coerce* an employee of the acquired business to agree to an employment contract which contains noncompetition covenants and which appears to be the result of a true bargain *but is actually a contract of adhesion*. See note 1 supra; Restatement (2d) of Contracts § 164 [sic][2] Comment b (1981) (*Courts will not redraft overbroad covenants extracted by taking advantage of dominant bargaining power.*).

[emphasis added]. In other words, the *in terrorem* effect cited by the *Rita* Court takes place through the enforcement of adhesion contracts. Therefore, the Georgia Supreme Court effectively created an irrebuttable presumption that employment contracts in these cases are contracts of adhesion.[3]

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[2] If one reviews note 1, it becomes obvious that this citation contains a typographical error and that the Supreme Court of Georgia meant to cite Restatement (2d) Contracts § 184, Comment b.

[3] In Enumeration of Error Number Two in his Appellant's Brief, Hogan asked the Court of Appeals, in a question of first impression, whether the *White* Court actually created a rebuttable presumption of fact that an employment contract was an adhesion contract. As with his contentions regarding

In addition, other Supreme Court of Georgia precedent concerning one doctor working under the terms of an employment contract for another doctor demonstrates that unequal bargaining power alone does not render a contract voidable:

> One may not 'void a contract on grounds of duress merely because he entered into it with reluctance, the contract is very disadvantageous to him, *the bargaining power of the parties was unequal* or there was some unfairness in the negotiations preceding the agreement' 17 C.J.S. 944, s 168.

[emphasis added]. *Tidwell v. Critz*, 248 Ga. 201, 204, 282 S.E.2d 104, 108 (1981). In addition:

> In determining whether undue influence has been exerted, the courts will closely scrutinize . . . facts which show that the defendant 'created the relationship of dominance' over the plaintiff . . . not all influence can be said to be undue 'since a person is not prohibited from exercising proper influence to obtain a benefit to himself.'

[citations omitted]. *Id.*, 248 Ga. at 206, 282 S.E.2d at 109. Since unequal bargaining power alone does not render a contract voidable, the only logical interpretation of the *Waffle House* rationale[4] is that classification of an

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mootness, the Court of Appeals declined to perform its O.C.G.A. § 5-6-30 statutory duty to address this question, which apparently constitutes a holding that an employer may not rebut such a presumption.

[4] "The rationale behind the distinction in analyzing covenants not to compete is that a contract of employment inherently involves parties of unequal bargaining power to the extent that the result is often a contract of adhesion. On the other hand, a contract for the sale of a business interest is far more likely to be one entered into by parties of equal footing. [*citing White, supra*]. *Watson v. Waffle House, Inc.*, 253 Ga. 671, 671-72, 324 S.E.2d 175, 177 (1985).

agreement as an employment contract creates an irrebuttable presumption that the contract is an adhesion contract.

IV. Indefinite Provisions Do Not Render Restrictive Covenants Unenforceable.

On pages 4-6 in his Brief in Opposition, Martino spends considerable time arguing that the provisions of the restrictive covenants were vague, indefinite, etc. and could not be enforced for this reason, regardless of classification. The Court of Appeals did not address this question in its opinion. Had the Court of Appeals considered this question, it would have had to address the argument that O.C.G.A. § 13-3-44(a) (1981) would allow partial enforcement.

In *Pepsi Cola Bottling Co. v. First Natl. Bank of Columbus*, 248 Ga. 114, 116, 281 S.E.2d 579, 581 (1981), the Supreme Court of Georgia applied O.C.G.A. § 13-3-44(a) (1981) modern equitable promissory estoppel to an indefinite contractual provision and concluded:

> . . . the problem with this agreement stems from the fact that the bank's promise to forbear setoff *lacks a term of duration which, arguably, renders the contract too indefinite to enforce. . . . We find this omission not controlling* . . . [citations omitted].

[emphasis added]. The *Pepsi Cola* Court's solution squares entirely with the observation from 3 Corbin on Contracts § 8.11 (rev. ed. 1996 Holmes) regarding modern equitable promissory estoppel (codified in Georgia as O.C.G.A. § 13-3-44(a) (1981)) that:

> Cases arose with defects in contract formation . . . courts perceived the need for corrective justice between the parties . . . Rather than focusing on the promise as an element of mutual assent, the analysis at this stage turned to the notion of a promissory commitment centering on the promisee's right to rely and the promisor's duty to prevent foreseeable reliance. **The required**

"promise" was not viewed in terms of a "clear and definite" offer/promise.

[emphasis added]. As a result, a Georgia appellate court applying O.C.G.A. § 13-3-44(a) (1981) to this case would not find that the restrictive covenants are too vague or indefinite to be partially enforced.[5]

V. No Dispute Regarding Negotiation of Restrictive Covenants.

In footnote 2 on page 5, Martino disputes that the restrictive covenants were negotiated. In his Appellees' Brief, Martino admitted that the *"[restrictive] covenants were not disturbed during negotiations."* [emphasis added] (page 29). Hogan fails to see any dispute on this question; however, the salient point remains that the parties agree that *in fact* the contract in this case is not an adhesion contract.

VI. Liberty to Contract Grounded in Constitution.

On page 10 of his Brief in Opposition, Martino contends that the contract at issue does not involve a right worthy of review. To the contrary, it is a deeply rooted principle that the freedom to contract is a Fourteenth Amendment "liberty" which may not be arbitrarily restrained by a State. *Miller v. Wilson*, 236 U.S. 373, 35 S. Ct. 342, 59 L. Ed. 628 (1915).

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[5] In Enumeration of Error Number 5 in his Appellant's Brief, Hogan asked the Court of Appeals, as an issue of first impression, to apply O.C.G.A. § 13-3-44(a) (1981) to the fact situation surrounding the restrictive covenants in this case. As with his points of law regarding mootness, the constitutionality arguments, and the possibility of the rule of law creating a rebuttable presumption of an adhesion contract, the Court of Appeals declined to adhere to its O.C.G.A. § 5-6-30 statutory duty to address this enumeration of error.

VII. Martino's Presentation of Argument as "Facts".

On pages 12-14 of his Brief in Opposition, Martino provides an argumentative recital of what he characterizes as "the facts of the case". Suffice it to say that Hogan has counter-arguments to Martino's arguments; however, the pertinent point remains that, in light of Martino's agreement that the contract at issue is not an adhesion contract, Martino's argumentative recital is not germane to the question raised in the Petition: is the Georgia Supreme Court's rule of law unconstitutional?

VIII. Partial Severance Not Prohibited By Georgia Constitution.

On page 15 of his Brief in Opposition, Martino implies that partial severance of restrictive covenants ancillary to employment contracts is prohibited by the Georgia Constitution because the Georgia Constitution is "hostile" to restraints on competition. This contention misses the core essence of both partial severance and the Georgia Constitution.

6A Corbin on Contracts § 1390, page 67 (1962) sets forth "justice" as the driving force behind partial severance by stating as follows:

> With respect to partial illegality, the real issue is whether partial enforcement is possible without injury to the public and *without injustice to the parties themselves.*

[emphasis added].

The Preamble to the Georgia Constitution provides in relevant part as follows: "To . . . insure justice to all . . . we the people of Georgia . . . do ordain and establish this Constitution." As a fundamental fiber coursing throughout the Georgia Constitution, insuring "justice to all" is a policy which must be carried out in the enforcement of Constitutional provisions.

The express language of O.C.G.A. § 13-3-44(a) (1981) directs a court to enforce a promise to the degree necessary to avoid injustice.[6] The Georgia Constitution is far from hostile to this proposition; the Preamble to the Georgia Constitution demonstrates that the people of Georgia demand it. Consequently, the Georgia Constitution is not intrinsically hostile to partial severance.

CONCLUSION

For the above and foregoing reasons, as well as all of the reasons contained in the Petition for Certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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[6] In the Restatement (2d) Contracts, Section 90 (codified verbatim in Georgia as O.C.G.A. § 13-3-44(a) (1981)) sets forth the general principle of modern equitable promissory estoppel; Section 184(2) is the specific application of that principle to restrictive covenants: justice is achieved by enforcing a covenant's reasonable restraints if the person seeking enforcement did not take advantage of dominant bargaining power.